

- (2) Whether claimant gave timely notice.
- (3) The nature and extent of claimant's permanent disability, if any, and the compensation due therefore.
- (4) Whether the respondent is entitled to a lien on claimant's third party recovery pursuant to K.S.A. 44-504(b)(Ensley).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes:

Claimant has failed to sustain the burden of establishing either accidental injury or occupational disease arising out of and in the course of her employment.

Claimant alleges that she suffered an occupational disease from exposure to chlordane used to spray the restaurant being operated by the respondent from September 23, 1987 through October 10, 1987. At the time of the exposure claimant was working as a part-time employee for respondent, acting as manager of the work done to prepare the restaurant for its initial opening. During the same time she continued to work as a full-time employee for another restaurant, the Brass Deli. After claimant ceased working for respondent in October 1987 she continued her full-time employment with the Brass Deli through March 1, 1989. Although the point is disputed, claimant testified that she left her employment from the Brass Deli because of illness resulting from the exposure to chlordane in October of 1987.

The Special Administrative Law Judge found, principally on the basis of the testimony of Dr. Hinshaw, that the exposure to chlordane caused claimant to suffer a condition known as multiple chemical sensitivity. In contrast to the testimony of Dr. Hinshaw, respondent produced, by deposition, the testimony of Dr. Thomas Bloxham. Dr. Bloxham conducted a series of tests and concluded that claimant has no physiological condition or symptoms which could be contributed to the exposure to chlordane. After evaluating the evidence, the Appeals Board finds more convincing the testimony of Dr. Bloxham.

Dr. Hinshaw began treating claimant approximately three years after the exposure at work. He acknowledges the testing done in October of 1987, not long after the exposure, yielded no evidence of chlordane in claimant's blood. He states the testing was not sensitive enough to reflect normal limits in the average population. He does not explain why abnormal limits might not have been reflected. The record clearly indicates that chlordane is rapidly eliminated from the blood. However, in October of 1987 claimant was suffering the symptoms which caused her to seek medical treatment. Dr. Hinshaw does not, in our opinion, adequately explain this circumstance. He gives a highly general definition of multiple chemical sensitivity and is unable to describe the symptoms typically attributed to that sensitivity. While we recognize he is, in effect, stating that the nature of this condition is such that one cannot give a specific description of symptoms generally attributable to the condition, his testimony in this case is too general and too vague to carry claimant's burden of establishing that claimant has multiple chemical sensitivity as described by Dr. Hinshaw.

The testimony of Dr. Bloxham, on the other hand, describes a series of normal tests including testing for active allergies, pulmonary testing and other blood tests, all of which yielded normal results. After reviewing the record the Appeals Board concludes that claimant does not have multiple chemical sensitivity and has not established that she suffers from any condition which is, on a physiological basis, attributable to the exposure to chlordane.

The Appeals Board does find convincing the testimony of T.A. Moeller, Ph.D. Dr. Moeller, a psychologist, evaluated the claimant at the request of claimant's counsel. He saw the claimant on several occasions and reviewed the medical records, including those of treatment prior to the exposure of chlordane involved in this case. He conducted a series of psychological tests. He interviewed one of claimant's family members. Dr. Moeller found no evidence of an organic problem and no evidence of malingering. Dr. Moeller's diagnosis included major depression, somatization disorder and conversion disorder. He considered the depression and somatization disorder to be conditions which preexisted the exposure to chlordane. He believed it was possible they were aggravated or exacerbated by the exposure but he could not say so to a reasonable degree of probability. The conversion disorder is, in his opinion, a direct and natural result of the exposure to chlordane at respondent's restaurant. The conversion disorder is one which, according to Dr. Moeller, produces physical symptoms.

A psychological injury is not compensable under Kansas law unless it is directly traceable to a work-related physical injury. Adamson v. Davis Moore Datsun, Inc., 19 Kan. App. 2d 301, 868 P.2d 546 (1994). In this case claimant has failed to prove her condition is traceable to physical injury. She testifies to flu- or cold-like symptoms shortly after the exposure to chlordane. There is no evidence, however, that these were anything other or different from the psychological reactions described by Dr. Moeller. Dr. Moeller indicates that he cannot say whether there was a physiological reaction to the chlordane. Dr. Bloxham testified he had no opinion on this issue because he did not see claimant at the time of her initial complaints. For the reasons described above the Appeals Board has concluded that it does not find persuasive the testimony of Dr. Hinshaw. In the absence of a physical injury, the psychological condition is not compensable. The Appeals Board, therefore, finds that the decision by the Special Administrative Law Judge should be reversed.

The above-described finding on compensability renders moot other issues raised in this appeal.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated January 25, 1995 should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bruce A. Swenson, Wichita, KS
Mary E. Giovanni, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director